

UNITED STATES OF AMERICA

DEPARTMENT OF LABOR

In the Matter of

U.S. DEPARTMENT OF LABOR

v.

CONFORMITY PROCEEDING

STATE OF ALABAMA

DEPARTMENT OF INDUSTRIAL RELATIONS

and STATE OF NEVADA EMPLOYMENT

SECURITY DEPARTMENT

DECISION OF THE SECRETARY

The unemployment compensation laws of the States of Alabama and Nevada must be determined by the Secretary of Labor, by October 31, 1979, to be in conformity with the requirements of the Federal Unemployment Tax Act (26 U.S.C. 3301-3311), hereinafter referred to as FUTA, in order to be certified under section 3304(c) of FUTA and thereby to have those States receive the benefits for themselves and their inhabitants provided by Title III of the Social Security Act, 42 U.S.C. 501-504, and FUTA. Such benefits include federal grants for the administration of their unemployment compensation laws as well as tax credits for private employers within the states. The purpose of this proceeding is to determine whether the Alabama and Nevada unemployment compensation laws are in conformity and/or in substantial compliance with the requirements of FUTA.

The issue is whether FUTA requires State unemployment compensation laws to provide coverage for employees of non-profit church-related elementary and secondary schools. Alabama and Nevada take the position that it does not. It is the position of the U.S. Department of Labor, hereinafter referred to as the Department or USDOL, that the unemployment compensation laws of such States are not in conformity with the requirements of FUTA, and/or that such States are not in substantial compliance with such requirements, because of the lack of such coverage.

Pursuant to the request of the States of Alabama and Nevada, a hearing was held before an Administrative Law Judge, hereinafter sometimes referred to as the Judge, at which an opportunity was afforded to examine witnesses and introduce documentary evidence relating to the issues. Thereafter, parties and interested parties filed briefs and presented oral argument.

On October 11, 1979, the Judge issued a recommended decision in the matter, in which he found that Alabama and Nevada are in compliance with the requirements of FUTA, and he recommended that I so determine.

The U.S. Department of Labor has filed exceptions to the Administrative Law Judge's

recommended decision. It contends that the Judge erred in finding that the Alabama and Nevada unemployment compensation laws are in conformity with the requirements of FUTA and that those States are in compliance therewith.

An outline of some of the statutory background would be helpful in the consideration of the issue. During the depression of the 1930's, when unemployment exceeded 25 percent of the work force in the nation, Congress enacted legislation which was the forerunner of FUTA to provide for the establishment of unemployment compensation programs in the States. Beginning in the mid-1950's, there was a steady expansion of unemployment insurance coverage under the Federal-State unemployment compensation program. For example, originally employers of eight or more employees were covered. In 1954, coverage was extended to employers of four or more employees.

The Employment Security Amendments of 1970 further extended coverage to employers of one employee. In addition, they amended the Internal Revenue Code of 1954 by adding subsections (6) (A) and (B) to the existing section 3304(a), and a new section 3309. The new section 3304(a)(6)(A) required State laws to cover, for compensation purposes, employees of nonprofit organizations and employees of State hospitals and institutions of higher education.

Subparagraph (b) of the new section 3309 permitted the States to exclude, inter alia, from the mandatory coverage of nonprofit organizations and State hospitals and institutions of higher education, service performed:

- (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;
- (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
- (3) in the employ of a school which is not an institution of higher education;

See 84 Stat. 697-698; 26 U.S.C. 3309(b)(1), (b)(2) and (b)(3)(1970).

What followed thereafter is described in the Memorandum of Points and Authorities submitted by the USDOL, hereinafter sometimes referred to as USDOL Memo, at pages 9-11 (footnotes are omitted):

Even the increasingly expanded Federal-State Unemployment Compensation Program, however, proved inadequate in the 1974-1975 economic downturn. Late in 1974, the Congress passed two remedial laws as temporary measures. The Emergency Unemployment Compensation Act of 1974 (Pub. L. No. 93-573, 88 Stat. 1869) was similar to its predecessor, the Emergency Unemployment Compensation Act of 1971, and further extended benefits for individuals in the regular unemployment compensation programs. The Emergency Jobs and Unemployment

Assistance Act of 1974, Pub. L. No. 93-567, 88 Stat. 1845, enacted, in Title II, a Special Unemployment Assistance (SUA) Program. This program was intended to cover an estimated 12 million workers who were not covered by the regular unemployment compensation laws, including state and local government employees, agricultural workers, domestic employees and employees of nonprofit elementary and secondary schools. The SUA program was administered by state unemployment compensation agencies as the agents of the Secretary of Labor, with the federal government assuming the costs of benefits and of program administration.

The SUA program was, in effect, replaced by the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667. These amendments were designed to provide coverage under the permanent Federal-State Unemployment Compensation Program for substantially all the nation's wage and salary earners and thereby to eliminate the need for the temporary SUA program. H. R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975). The 1976 amendments specifically eliminated the exclusion for service performed in the employ of nonprofit elementary and secondary schools which had been added in 1970 as part of the new § 3309(b) of the Internal Revenue Code of 1954. (Underscoring supplied.)

The question is whether the 1976 amendment repealing the exemption for nonprofit elementary and secondary schools contained in section 3309(b) (3) of FUTA requires the coverage of church-related schools.

The States of Alabama and Nevada contend, among other things, that under the plain language of section 3309(b)(1) of FUTA (26 U.S.C. 3309(b)(1)) church schools are exempt from coverage under FUTA; that the plain language of a statute is controlling unless the legislative history reveals clear evidence of a contrary intent; that church schools are exempt under section 3309(b)(1)(A) because they generally have no separate legal status from their governing church, and because they are an integral part of their governing church; that church schools, and others not technically a legal part of their church, are also excluded from coverage under section 3309(b)(1)(B) because they are operated primarily for religious purposes. Alabama and Nevada argue that the pertinent legislative history does not indicate that Congress intended employees of church schools to be covered under FUTA. It is their position that such coverage would violate the freedoms guaranteed to religious groups under the First and Fourteenth Amendments to the Constitution; that it would involve excessive governmental entanglement in church affairs, and therefore would be unconstitutional under the tests established by the Supreme Court.

The provisions of 26 U.S.C. 3304(a)(6)(A) and 3309, as amended by the 1976 Amendments, particularly the amendment repealing the exemption for nonprofit elementary and secondary schools provided in section 3309(b)(3), have been interpreted by the U.S. Department of Labor as requiring unemployment compensation coverage of all services performed in the employ of all private nonprofit elementary and secondary schools, including church-related schools, with certain exceptions as provided in 26 U.S.C. 3309(b). In accordance with USDOL's interpretation, the only services performed in church-related elementary and secondary schools recognized as being within the scope of the exemption permitted by section 3309(b)(1) of FUTA, (aside from the permitted § 3309(b)(2) exceptions) are those strictly church duties (as distinguished from school duties) performed by church employees at the schools pursuant to their church responsibilities. (See USDOL Memo, pp. 1-2; Exceptions, pp. 11-13.)

The position of the Department of Labor, as presented on pages 11 through 22 of its Memorandum of Points and Authorities, including the footnotes incorporated therein, is set out below.

THE LEGISLATIVE HISTORY OF FUTA SUPPORTS THE DEPARTMENT'S
INTERPRETATION THAT ALL CHURCH-RELATED SCHOOLS ARE NOW SUBJECT TO
COVERAGE

While FUTA on its face gives little guidance concerning the interrelation between the repeal of the 1970 § 3309(b)(3) school exemption and the retention of the § 3309(b)(1) religious organization exemptions, its history and remedial purposes militate strongly in favor of construing the statute to cover all elementary and secondary schools, including those organized by the churches in Alabama and Nevada (and all other states), within state unemployment insurance coverage.

A. The Unemployment Compensation Amendments of 1976 represent the culmination of congressional efforts to provide virtually universal unemployment insurance coverage and should be construed in that light

Since the original enactment of the Federal-State Unemployment Compensation Program, Congress has followed an unbroken path towards expansion of unemployment insurance coverage. This movement accelerated in the 1970's and culminated in the 1976 Amendments which provide coverage under the permanent Federal-State Unemployment Compensation Program for substantially all of the nation's wage and salary earners. H.R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975).

This steady progress towards universal unemployment insurance coverage, together with the remedial nature of FUTA, trigger the application of several well-accepted rules of statutory construction, including the requirement that a statute will be interpreted in light of the purposes it seeks to achieve and the evils it seeks to remedy. *Fasulo v. United States*, 272 U.S. 620 (1926); *Holy Trinity Church v. United States*, 143 U.S. 457-472 (1892). Statutes must be given effect in accordance with the purpose manifested by Congress. *United States v. Ohio*, 354 F.2d 549, 555 (6th Cir. 1966)*; The use of an asterisk(*) denotes the leading case in each line of cases cited for a single proposition.¹³ *Commissioner of Internal Revenue v. Bilder*, 369 U.S. 499 (1962). This directive takes on particular significance in the context of the instant case since remedial social legislation is to be construed liberally in favor of the workers whom it was designed to protect. *Wirtz v. Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir. 1967)*. See also, *United States v. Silk*, 331 U.S. 704 (1947); *Phillips Inc. v. Walling*, 324 U.S. 490 (1945); *Israel-British Bank (London) Ltd. v. F.D.I.C.*, 536 F.2d 509, 513 (2d Cir. 1976). Finally, there is a requirement that remedial legislation be broadly construed and that exceptions be narrowly applied. *Phillips Inc. v. Walling*, *supra*, at 493. See also, *Korherr v. Bumb*, 262 F.2d 157, 162 (9th Cir. 1958); *Hamblen v. Ware*, 526 F.2d 476, 477 (6th Cir. 1975). Under an analogous remedial statute, the Fair Labor Standards Act, it has been held that exemptions are to be narrowly construed against the employer *Schultz v. Louisiana Trailer Sales, Inc.*, 428 F.2d 61, 67 (5th Cir. 1970). *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388* (1960); *Mitchell v. Kentucky Company*, 359 U.S. 290, 295, 79 S.Ct. 756, 759, (1959); *Yogurt Master, Inc. v. Goldberg*, 310 F.2d 53, 55 (5th Cir. 1962).¹⁴

B. Congress intended the unemployment compensation amendments of 1976 to extend unemployment insurance coverage to services performed for all elementary and secondary schools. In order to properly understand the objective behind the 1976 Amendments, it is necessary to briefly review the 1970 Amendments.

The Employment Security Amendments of 1970, by adding new language in 26 U.S.C. §§ 3304(a)(6), 3306(c)(8), and 3309(a)(1)(A), required State-law coverage of individuals employed by nonprofit organizations, including institutions of higher education. The legislative reports which accompany the amendments unmistakably show that Congress was concerned about the need of employees of church-related schools for protection against wage loss resulting from unemployment and intended to bring individuals employed in nonprofit institutions of higher education, including those operated by religious institutions under program coverage. H.R. Rep. No. 612, 91st Cong., 1st Sess. 11 (1969).

In fact, Congress, quite explicitly limited the availability of the § 3309(b)(1) exemption as applied to institutions of higher education. See H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969), and S.Rep. No. 752, 91st Cong. 2d Sess. (1970) at 48-49. Congress' references to "separately incorporated" institutions in the reports were clearly examples of the delineation of coverage, and were not intended as a full explanation of the extent of such coverage.¹⁵ Congress clearly expected that the "operated primarily for religious purposes" language contained in § 3309(b)(1)(B) would be narrowly construed, preventing its application to educational institutions of higher education. The Department of Labor has followed the congressional mandate for coverage of private nonprofit organizations, including institutions of higher education, and consistently interpreted the 1970 Amendments to require State law coverage of all institutions of higher education except for the narrow category of seminaries and novitiates.

In light of Congress' intention in 1970 to bring religiously affiliated colleges and universities within coverage, and in the face of the Department's subsequent adoption of this interpretation, Congress' description, in 1976, of the objective behind the repeal of § 3309(b)(3) is made even more informative. See H.R. Rep. No. 755, 94th Cong., 1st Sess. 56 (1975) and S.Rep. No. 1265, 94th Cong. 2d Sess. 2 (1976).

Any lingering doubt concerning Congress' desire to extend coverage to all elementary and secondary schools is satisfied by reference to the statistical data cited by Congress regarding the anticipated effect of the 1976 Amendments. The Senate Report, S.Rep. No. 1265, 94th Cong., 2d Sess. 8 (1976), estimated the number of new employees who would be covered as a result of the repeal of § 3309(b)(3) at 242,000. This figure is essentially identical to the then available best estimate of the total number of employees in all nonprofit elementary and secondary schools. At the September 26, 1979 hearing in this matter it was stipulated between the parties that the 242,000 figure was supplied to Congress by DOL. (Transcript p. 86). Moreover, the testimony of

Mr. Louis Benenson at that hearing establishes that the 242,000 figure clearly included all employees of church-related elementary and secondary schools. (Transcript, pp. 69–73) See also DOL Exhibits 6–8.¹⁶ Without the inclusion of employees of church-related elementary and secondary schools, the figure would have been substantially less than 242,000 because the staff of church-related elementary and secondary schools comprise more than half of the staff of all non- public elementary and secondary schools in the United States. According to the Census Bureau's Statistical Abstract of the United States (1977 ed.) there were 261,000 full-time teachers in the nonprofit elementary and secondary schools in 1975, of which 150,000 were in Roman Catholic schools, pp. 145, 147, tables 235, 237. * * * Compare DOL Exhibits 6–8.¹⁷

Thus, in setting forth the projected impact of the repeal of § 3309(b)(3), Congress could only have contemplated that the repeal of § 3309(b)(3) would bring all elementary and secondary schools within FUTA coverage. Considering the total absence of any indication that Congress intended an alternative interpretation, and noting particularly the necessity that the exceptions to coverage be construed narrowly, the Department's construction of the Act is virtually mandatory.

II

THE GENERAL PRINCIPLE OF CONSTRUING STATUTES TO AVOID UNNECESSARY CONSTITUTIONAL DECISIONS IS INAPPLICABLE IN THIS CASE

The general principle that a court should construe a statute to avoid unnecessary constitutional decisions is inapplicable in this case, because the Department's interpretation that due to the elimination of the exemption formerly provided in 26 U.S.C. § 3309(b)(3), church-related schools are now subject to unemployment insurance coverage is correct in light of the legislative history discussed above and, in any event, does not present any constitutional infirmities. There are two reasons why the Department's interpretation does not give rise to any constitutional problems.

First, unemployment insurance coverage of church-related elementary and secondary schools does not create excessive entanglements. To the contrary, the necessary involvement between such schools and the government would be minimal. While certain records would have to be maintained and determinations of eligibility for benefits would have to be made, there would be no need to become involved in such issues as resolving disputes as to church doctrines in order to resolve claims for benefits. See the testimony of Mr. Bernard Street (Transcript, pp. 107-108). With respect to this point it is noteworthy that the First Amendment does not prohibit all involvement between church and state, but merely entanglement which is deemed excessive. *Walz v. Tax Commission*, 397 U.S. 664 (1970). Moreover, not all procedures for surveillance and auditing result in excessive government entanglement with religion. See, e.g., *Wolman v. Walters*, 433 U.S. 229 (1977); *Committee for Public Education v. Levitt*, 461 F. Supp. 1123 (S.D. N.Y. 1978). If the surveillance and monitoring occur primarily at the governmental level and do not require interference with the internal operations of the schools, the entanglement is not excessive. *Committee for Public Education v. Levitt*, *supra*.

These very same arguments were recently made on behalf of the Archdiocese of Milwaukee, et al. as intervenors in *Alice Decker, et al. v. USDOL, et al.*, E.D. Wisconsin, C.A. No. 78-C-634 in a memorandum in support of the intervenors' motion for reconsideration and amendment of the court's Decision and Order enjoining the state and federal administrators of Title II of the Comprehensive Employment and Training Act of 1973, as amended, 29 U.S.C. § 841, et seq. (CETA), from funding CETA positions in church-related elementary and secondary schools.¹⁸ Consistent with the cases just cited, the amount of involvement between government and churches resulting from an adoption of the Department's interpretation of 26 U.S.C. § 3309(b) cannot reasonably be viewed as rising to the level of excessive entanglements.

The second reason why the Department's interpretation of § 3309(b) does not present constitutional infirmities is that, with one exception not here relevant Section 3304(a)(6)(A) of FUTA precludes payment of benefits to teachers unemployed between academic terms under certain circumstances.¹⁹ FUTA does not mandate that state unemployment insurance laws deny any individuals unemployment benefits. Thus, while 26 U.S.C. 3304(a)(10) permits the state to provide for the denial of benefits to individuals discharged for misconduct in connection with their work, etc., the state is not required to provide for such a denial. See section 25-4-78-(3), Code of Alabama 1975, Alabama Exhibit, para. 79, and section 612.385 of Nevada Revised Statutes (1979) and Nevada Exhibit A, paragraphs 40 through 44.²⁰

Thus, even assuming, arguendo, that the extension of coverage to church-related elementary and secondary schools would result in excessive entanglement as a result of current provisions of state law regarding the denial of benefits for misconduct, etc., the above factor, we submit, precludes a holding that the Department's interpretation of FUTA is facially unconstitutional on entanglement grounds since the Department's interpretation does not necessarily result in the type of entanglements about which Alabama and Nevada are so concerned. It is in this context that it is also appropriate to consider the recent decision in *N.L.R.B. v. Catholic Bishop of Chicago*, 99 S.Ct. 1313 (1979) in which the court found that the National Labor Relations Act (NLRA) coverage of parochial schools raised "serious constitutional questions" (albeit without finding unconstitutionality). The Court expressed two concerns in that case, one of which can be best described as involving the "chilling effect" of mandatory collective bargaining on the ability of clerical authorities to administer their schools and the other relating to the potential problems created by requiring the Board to adjudicate employer/employee disputes in a sectarian school setting. Unlike the situation in the Catholic Bishop case, *supra*, unemployment insurance coverage does not necessitate state involvement in the development of curriculum, faculty standards, working conditions or any other aspect of school operations. In fact, the unemployment insurance system would generally only be triggered after an employee had been terminated and his or her connection with the school severed.

To the extent that it may be argued that the second area of the Supreme Court's concern regarding unfair labor practice adjudications in *Catholic Bishop*, *supra*, raises some possible parallels with certain aspects of the unemployment insurance system, it must be recognized that these problems arise because of state law provisions and not because of the Department's

interpretation of § 3309(b) of FUTA. The point to be made is simply that potential entanglements cannot be used to negate unemployment insurance coverage for former employees since coverage itself does not inevitably create any entanglements.

The Catholic Bishop case, *supra*, is further distinguishable in that despite coverage by a state unemployment insurance law, the church school employer remains free to employ or not employ any individual it chooses on whatever basis it desires. The only impact of unemployment insurance coverage is that some of these decisions will now have some financial impact, albeit an impact no greater than that borne by private non-sectarian schools. The concept that the first amendment protects both the practice of religion and also spares one the financial burdens of such practice was rejected in *Braunfield v. Brown*, 336 U.S. 599 (1961) where the Court concluded that a statute could not be invalidated on free exercise grounds merely because it made the practice of religion more expensive.

Nor is there any basis whatsoever for DIRSA's [the Department of Industrial Relations of the State of Alabama's] and NESD's [the Nevada Employment Security Department's] apparent belief that employer/ employee relations of church-related schools in Alabama and Nevada respectively are constitutionally immune from such impact. Clearly, they can claim no exemption from child labor laws, *Prince v. Massachusetts*, 321 U.S. 158 (1944) or minimum wage requirements, *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954), certiorari denied, 347 U.S. 1013 (1954). Moreover, DIRSA and NESD acknowledge the authority of the government to require and the obligation of church-related schools in Alabama and Nevada respectively to maintain a safe workplace. Alabama Exhibit A, para. 67; Nevada Exhibit A, para. 12.

The right of individuals to send their children to religiously sponsored schools has been established for more than fifty years. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Department seeks no alteration in that principle. The Department's interpretation of § 3309(b) of FUTA will not require an examination into the religious motivations or religious doctrine of church-related elementary or secondary schools or in their employment decisions. The Department's position is uncomplicated. Employees of all elementary and secondary schools who become unemployed are entitled to coverage. Where such school activities have been performed by the claimant section 3309(b)(1) or the equivalent state law provision is not available as an exemption because coverage of elementary and secondary school activity was intended by Congress to protect former school employees from the vicissitudes of unemployment. To conclude otherwise would be to carve out a special rule based upon religious motivation offending the Establishment Clause of the First Amendment to the Constitution.

The Department of Labor takes exception to a number of statements, findings and conclusions contained in the Judge's recommended decision in this proceeding, as well as to his failure to make certain findings of fact. On pages 8-10 of the Department's Statement of Exceptions, hereinafter referred to as Exceptions, it states:

The primary exception which USDOL takes to Part III [of the Judge's recommended decision, on pages 4–5 thereof] stems from the conclusion expressed in the first paragraph of that section to the effect that, since "(e)ssentially all the facts relevant to the issues presented have been stipulated by the parties . . . no recommended findings need be made." While the parties did stipulate as to many facts, additional relevant evidence was introduced at the time of the evidentiary hearing as to which the parties did not stipulate. Specifically, this evidence primarily pertained to both (a) the development by USDOL of the 242,000 figure contained in Senate Report No. 1265, 94th Cong., 2d Sess. 8 (1976), and which was used to explain the estimated number of additional elementary and secondary school employees who would be covered as a result of the repeal of FUTA § 3309(b)(3); and (b) the fact that it is unnecessary to get involved in church doctrine in determining whether a former employee of a church-related school is entitled to benefits. Accordingly, USDOL takes exception to the absence of such recommended findings and urges that the Secretary correct this error by adopting the following findings of fact:

(1) Prior to the enactment of the Unemployment Compensation Amendments of 1976, USDOL, at the request of Congressional staff, prepared an estimate of the total number of employees of all non-profit elementary and secondary schools within the United States. The estimate so prepared was 242,000. Tr., 67-73. DOL Exhibits 6-8.

(2) This 242,000 figure represented a statistical determination of the number of non-profit elementary and secondary school employees who were not covered under FUTA prior to the 1976 Amendments. Tr., 75.

(3) USDOL's 242,000 estimate of the total number of all non-profit (church-related and non-church related) elementary and secondary school employees was furnished by USDOL to staff persons in Congress. Tr., 86.

(4) In determining the eligibility of a former employee of a church-related elementary or secondary school for Supplemental Unemployment Assistance it is unnecessary to determine that which constituted church doctrine and that which did not. Tr., 104-107.

(5) In determining the eligibility of a former employee of a church-related institution of higher education for unemployment compensation it is similarly unnecessary to resolve church doctrine. Tr., 104-107.

(6) In determining the eligibility for unemployment compensation of a former employee of a church-related school who either voluntarily quit or who was discharged for misconduct it is unnecessary to draw a determination as to what constitutes the actual doctrine of the church. Tr., 108. See also Tr., 126-127 & 136. Rather, the relevant inquiry revolves around the understanding of the parties and the intent of the claimant. Tr., 108 & 122-123.

(7) In an unemployment compensation case the person deciding the case does not establish or try to force any change to an employer's work rules. Tr., 123. Similarly, a hearing

officer in such a case cannot order reinstatement of the employee in the event a work rule is found to be unjustified. Rather, the only remedy is the grant of benefits. Tr., 124.

In addition, USDOL takes exception to the generalized summary of the stipulated facts concerning the Roman Catholic, Baptist and Lutheran elementary and secondary schools in that the summary as to each of those groups of church-related schools fails to recognize that such schools serve the same basic educational purposes and have the same basic academic structure and courses of instruction as non-church-related elementary and secondary schools. Alabama Exhibit A, para. 33, 34, 45, 46, 66, 67, 71; Nevada Exhibit A, para. 11, 12, 17, 32. Further, this summary fails to recognize that these church-related schools are subject to State and local government fire, health and safety requirements. Alabama Exhibit A, para. 47 & 67.

In my opinion, the above-quoted exceptions of the Department are well-founded and valid. I find that the findings of fact recommended by the Department, numbered 1-7, quoted above, are supported by the record and are proper, and I adopt them as my own.

The Department takes exception to the conclusions expressed by the Judge in Part V, pages 7-9 of his recommended decision for several reasons, discussed on pages 13-18 of its Exceptions which are set out below, including the footnotes incorporated therein.

First, little or no weight should be afforded the three cases cited as precedent in this section. This is so because the USDOL was not a party to either *Trinity Evangelical Lutheran Church v. Department of Industrial Relations*, Case No. CV 78 500325, Cir. Ct. Mobile County, Alabama (January 27, 1979) or *Roman Catholic Church v. State of Louisiana*, No. 219, 660, 19th Jud. Dist. Ct., East Baton Rouge Parish, La. (August 31, 1979), and thus did not have the opportunity to present relevant evidence or even its arguments to those courts. While USDOL was a party in *Grace Brethern v. State of California*, Case No. CV 79-93, USDC CD Calif. (September 21, 1979) the decision rendered in that case was simply on plaintiffs' motion for a preliminary injunction. Not only has there not yet been a final hearing in *Grace Brethern*, but consideration is currently being given to filing an appeal from that interlocutory order.

In any event, with respect to these three decisions, it is important to realize that to a great extent the cases went off on constitutional tangents which, in the present proceeding, are both unauthorized and unwarranted. See Mr. Streett's testimony at the evidentiary hearing, TR., 103-129, to the effect that in determining a claimant's eligibility for unemployment compensation it is unnecessary for the State to become involved in church doctrine. However, assuming, *arguendo*, that there do exist certain entanglements between covered church-related schools and the State as a result of its administration of its unemployment compensation law, it does not necessarily follow that such State involvement infringes upon the First Amendment rights of church-related schools. See USDOL's Memorandum of Points and Authorities, pp. 17-18. See also the decision in *Stewart, et al. v. Commissioner*, U.S. Tax Court, No. 1332-78 (July 31, 1979) and *Hatcher v. Commissioner*, U.S. Court of Appeals, Tenth Circuit, No. 78-1883 (July 27, 1979). In each of these cases there was a governmental inquiry into the religious beliefs of the taxpayer and of the religious sect in order to determine whether the taxpayer qualified for an exemption on religious grounds from the self-employment tax. In neither case did the court find a First Amendment problem. These cases therefore illustrate that even where there is an inquiry into the religious tenets of a person and/or a particular sect, there is no violation of the First Amendment so long as the provision in question has a secular purpose and it does not foster

excessive government entanglement with religion.⁷ Moreover, by adopting those three decisions here in their entirety, the Administrative Law Judge has inexplicably exceeded his authority by making conclusions of law as to the constitutionality of USDOL's interpretation of § 3309 of FUTA. See Rule of Procedure 14(b). 44 F.R. 47649 (August 14, 1979).

The remaining USDOL exceptions to Part V relate to four "additional comments" contained therein.

With respect to the first additional comment it need only be noted that the Recommended Decision fails to recognize that under USDOL's interpretation of § 3309 of FUTA it is appropriate to first determine the identity of the employing organization in order to determine the applicability of the § 3309(b)(1) exemption and, if the employer may be both a church and a church-related school, to thereafter determine whether the services performed for such employer are church duties or church school duties. If the latter, the § 3309(b)(1) exemption is inapplicable.

The second additional comment essentially states that no reliance should be placed upon the reference in the legislative history to the 242,000 figure previously discussed. USDOL takes exception to this conclusion for the reason that the record reflects the finding stated by Congress that the additional coverage occasioned by the deletion of the old § 3309(b)(3) exemption would amount to 242,000 employees. That number, as evidenced by the record, represented USDOL's best estimate of the total of all (church-related and non-church-related) non-profit elementary and secondary school employees. If any presumption is to be drawn with respect to Congress' understanding of what this figure represented, that presumption must be that Congress considered the testimony and data it received and knew what it said. Any other presumption would be improper. Furthermore, it is apparent from the final sentence of this second additional comment that the Administrative Law Judge's confusion as to USDOL's position in this case stems from his inability to distinguish between "church functions" and "church-school functions." It is only services related to those latter functions that USDOL contends are covered.

USDOL takes exception to the third additional comment for the reason that the legislative history to the 1976 Amendments to FUTA clearly reflects that Congress intended to extend coverage to all "nonprofit elementary and secondary schools" by deleting the exemption previously applicable to such schools. See USDOL's Memorandum of Points and Authorities, pp. 11–16. If Congress had intended to limit the extension of coverage to only that small proportion of non-profit elementary and secondary schools which are non-church-related, Fewer than 20 percent of the total of all non-profit elementary and secondary school employees are employed by non-church-related schools. DOL Exhibit 1, pg. 1.8 it is only reasonable that they would have so specified. This inference is strengthened by the fact that coverage of church-related institutions of higher education had been covered since the time of the 1970 Amendments. Even more support for this conclusion can be found in the fact that all non-profit elementary and secondary school employees not otherwise covered by State laws were covered by SUA, and by the fact that the Unemployment Compensation Amendments of 1976 were designed to "eliminate the temporary Special Unemployment Assistance Program" and extend "permanent" coverage to "substantially all the workers . . . covered by SUA." H.R. Rep. No. 94-755 at 17.

Finally, USDOL takes exception to the fourth additional comment for the reason that there is no support for the conclusion expressed that the Department's construction of § 3309(b) is inconsistent with other governmental interpretations of the term "church" used elsewhere in the Internal Revenue Code. Nowhere in the Internal Revenue Code is there a definition of the term "church" which includes church-related elementary and secondary schools. Not surprisingly, the regulation relied upon as authority for the proposition stated (26 CFR § 1.1508-1) is non-existent. If the reference was intended to be to 26 C.F.R. §5081 (a) (3) (a) it is inapposite since that regulation clearly does not define "church" as including church-related elementary and secondary schools.

After considering all the evidence and arguments concerning the issues, it is my conclusion that the views expressed by the Department of Labor in its Memorandum of Points and Authorities and in its exceptions to the Judge's decision are correct, for the reasons and on the basis of the authorities indicated therein. FUTA, as amended by the 1976 amendments, requires State unemployment compensation laws to provide coverage for employees of non-profit church-related elementary and secondary schools. The legislative history of the pertinent statutes shows that Congress intended to cover such schools under FUTA. Settled principles of statutory construction support such coverage, particularly the rules that remedial social legislation should be liberally and broadly construed as to coverage so as to accomplish its purpose and that exemptions from such statutes should be narrowly construed. I believe that covering such schools under FUTA does not create excessive governmental entanglement with religion and is within the limits of government regulation provided by the Constitution.

Accordingly, I find that the Alabama and Nevada unemployment compensation laws fail to conform to the provisions of the Federal Unemployment Tax Act, as amended. In accordance with the last sentence of section 3304(c) of that Act (26 U.S.C. 3304(c)) I find that those States have failed to amend their unemployment compensation laws so that they contain each of the provisions required by reason of the enactment of the Unemployment Compensation Amendments of 1976 to be included therein, specifically the provision required by reason of the enactment of amendments to section 3309(b) of FUTA. I also find that Alabama and Nevada have, with respect to the 12-month period ending on October 31, 1979, failed to comply substantially with that provision.

Dated at Washington, D.C. this 31st day of October, 1979.

Ray Marshall
Secretary of Labor
U.S. Department of Labor

Employment and Training Administration
U.S. Department of Labor
Washington, D.C. 20213

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